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Lawrence G. Ropes Jr.

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TORTS' DOCTRINE OF MUNICIPAL IMMUNITY— A MYTH

LAWRENCE G. ROPES, JR.*

INTRODUCTION

In Florida there is said to be a doctrine that prescribes that a municipality shall be immune from liability for the tortious acts committed by its employees acting in the scope of their public duties. It is the purpose of this article to refute that idea.

Though this doctrine is said to have had its inception under the common law which was adopted by the Legislature of the State of Florida,¹ there is no foundation for this assumption. The State of Florida adopted the common law as it existed on July 4, 1776. However, the basic case, *Russell v. Men of Devon*,² to which is ascribed this doctrine, was not decided until 1788. Therefore, it was never a part of the common law as that existed at the time of its adoption by Florida. Moreover, the *Russell* case did not involve a municipality, but rather, an action against a county for negligence in failing to keep a bridge in a reasonably safe condition. The basic reason why the court denied the right of action was that a "county" was the arm through which the sovereign acted and the duties placed upon the county were imposed by the sovereign without the consent of the inhabitants of the county. The court felt that where these duties were placed upon the county without such consent, to make the inhabitants liable it would take a legislative act, similar to the "Statute of Hue and Cry." Further, even if the court could exercise legislative discretion and hold the inhabitants of the county liable there would be a great reason for not giving this remedy. As the court said:

... where an action is brought against the corporation for damages, those damages are not to be recovered against the corporators in their individual capacity but out of their corporate estate. But if the County is to be considered a corporation, there is no corporate fund out of which satisfaction is to be made.

In other words, where mandatory duties were given to the county without the consent of the populace and without a common fund nor legal means of obtaining one for payment of damages for negligence in

*B.S., B.A., 1941, LL.B., 1950, University of Miami; Member of the Florida Bar; Member of the American Judicature Society.

1. *Bradley v. Jacksonville*, 156 Fla. 493, 23 So.2d 626 (1945); *Swanson v. Fort Lauderdale*, 155 Fla. 720, 21 So.2d 217 (1945); *McCain v. Andrews*, 139 Fla. 391, 190 So. 616 (1939).

2. 2 T.R. 667, 12 Eng. Rul. Cas. 694 (1788).

performing those duties, each inhabitant would be liable. In turn, the plaintiff in such a case would sue the richest man in the county who in turn would have to sue the rest of the inhabitants for contribution. This would result in interminable litigation. The common law would not impose this burden without a statute requiring it.

COUNTY AND MUNICIPALITY DISTINGUISHED

The Supreme Court of Florida, in "court-made" law, first adopted the rule laid down for counties in the *Russell* case and applied it to municipalities in the famous case of *Tallahassee v. Fortune*.³ Factually this case was on all fours with the *Russell* case, except that it concerned a municipality rather than a county. However, the city was held liable, since the duty to repair the public way was given to the city with the consent of the inhabitants and further, because the city, under its charter, had or was supposed to have a common fund out of which damages could be paid. The common fund was created by the exercise of the charter power of the city in assessing and collecting taxes and the power to purchase and hold real, personal and mixed property. The historical importance of the *Fortune* case was emphasized by the Supreme Court in 1924:⁴

... the rule of this State is that announced in the decisions of the Court from the City of Tallahassee v. Fortune to Kaufman v. the City of Tallahassee, and to the Maxwell case this day filed.⁵

The *Fortune* case distinguished the difference between aggregate corporations, such as municipalities, and quasi corporations, such as counties, in that the powers given counties are without the consent of the inhabitants whereas the powers given municipalities carry with them such consent, or may be supposed to have been given with their approval, since they were given the right to create a common fund resulting from the exercise of public duties. The municipalities have a proprietary interest in this common fund; therefore, a statute was not required to make the municipality liable for neglect of its public duties.

The propriety of drawing an analogy between the status of a county and that of a municipality so as to make the law respecting immunity equally applicable to both is questionable since the two units are easily distinguishable. These distinctions are made clear in *Keggin v. Hillsborough County*,⁶ where the court elucidated on the differences between counties and municipalities in their status as governmental units. The county is

3. 3 Fla. 19 (1849).

4. Kaufman v. Tallahassee, 87 Fla. 119, 100 So. 150 (1924).

5. Maxwell v. Miami, 87 Fla. 107, 100 So. 147 (1924); Kaufman v. Tallahassee, 84 Fla. 634, 94 So. 697 (1922); Tallahassee v. Fortune, 3 Fla. 19 (1849).

6. 71 Fla. 356, 71 So. 372 (1916).

a political subdivision of the state under the Florida Constitution,⁷ and it is not a corporation. It can be created by the state without the solicitation, consent or concurrence of its inhabitants. It was created for administrative purposes and is a representative of the sovereignty of the state. Also, it is an auxiliary to the state, an aid to the more convenient administration of the government and it is purely political in character. On the other hand, one feature which sufficiently distinguishes municipalities from counties is that municipalities are not political subdivisions of the state; and the county, under the constitution, being a mere governmental agency through which many of the functions and powers of the state are exercised, partakes of the immunity of the state from liability.⁸

Whereas the *Fortune* case laid down the theory of liability of municipalities for torts committed while in the exercise of public duties, it remained for another case, *Orlando v. Pragg*,⁹ to set up the formula for applying that theory and to complete the historical development of the law in regard to this doctrine of immunity. In that case, the city, acting under its police powers, abated a health nuisance. The lower court held the city liable, but this decision was reversed by the Supreme Court. The basis for the reversal was that the city was authorized to abate the nuisance and the employees abated it in an authorized manner. The Supreme Court set out its court-adopted rules on the liability of municipalities for *all* of its acts:

. . . the law is well settled that municipal corporations can be held liable for tortious acts that are committed while in the exercise of some power conferred upon them by law or in the performance of some duty imposed upon them by law. Where the act which produces the injury is outside the powers conferred upon the corporation it cannot be held in damages. A municipal corporation is liable in damages for a lawful and authorized act of its agents done in an unauthorized manner, but not for an unlawful or prohibited act.

Basically this is the law in Florida under *stare decisis*.

CLASSIFICATION OF CASES

It is possible for all the cases on point in Florida to be classified under three rules set out in the *Pragg* case, namely:

Classification I. A municipal corporation is not liable for the acts of its officers or agents committed pursuant to an authorized manner.

7. FLA. CONST. Declaration of Rights, § 4.

8. FLA. CONST. Art. VIII, §§ 1, 2.

9. 31 Fla. 111, 12 So. 368 (1893).

Classification II. A municipal corporation is not liable for the acts of its officers or agents committed pursuant to an unlawful or prohibited act.

Classification III. A municipal corporation is liable for the acts of its officers or agents committed pursuant to an authorized act, executed in an unauthorized manner.

Attached to this article is an appendix aligning every case in Florida on this doctrine into the above three classifications. Although the Supreme Court has not formally applied this theory to all the cases, the resulting decisions are in alignment therewith, though, as stated by the court, the manner of arriving at the result has been inconsistent.¹⁰

The failure of the Supreme Court to follow the rules laid down in the *Pragg* case has resulted from a continued "misquoting" of a citation in that case. The actual citation is:

. . . the law is well settled that municipal corporations can be held liable for tortious acts that are committed in the exercise of some power conferred upon them by law or in the performance of some duty imposed upon them by law.¹¹

However, it has been stated as follows:

. . . the law is well settled that municipal corporations can be held liable for tortious acts that are committed in the exercise of some *corporate* power conferred upon them by law, or in the performance of some duty imposed upon them by law. (Italics supplied).¹²

The addition of the word "corporate" has been cited in every case in Florida since the *Brown* case. The effect is that the theory of immunity set out in the *Pragg* case has been changed. It has resulted in a restrictive meaning, i.e., ministerial or proprietary. Therefore, the rules set down in the *Pragg* case do not encompass public duties of municipalities, but this cannot be the rule for in that case the city was acting in its public or governmental capacity, namely, abating a health nuisance. Furthermore, it is a well recognized rule of law that a municipality has no inherent powers and therefore, receives all of its powers from its corporate charter; therefore, all of its duties are by their nature, corporate. To attempt to restrict the law of the *Pragg* case, to say that the city gets some of its powers through incorporation and others through a nebulous right which is termed "governmental" is incongruous and misleading and contrary to the law laid down in that decision.

In order to demonstrate the application of the rules in the *Pragg* and *Fortune* cases to later Florida cases, certain cases are set out herein as

10. *Avon Park v. Giddens*, 158 Fla. 130, 27 So.2d 825 (1946).

11. 31 Fla. 111, 112, 12 So. 368, 369 (1893).

12. *Brown v. Eustis*, 92 Fla. 931, 110 So. 873 (1926).

pertinent. In *Scott v. Tampa*,¹³ suit resulted after police officers entered a building without a warrant and forcibly ejected the plaintiff. On these facts the court ruled that the officers had no right to enter the building and therefore all subsequent injuries resulted from the officers doing an unauthorized act. The act of entering the building without a warrant was *ultra vires* and thus the case falls in classification II *supra*.

The first case of *Kaufman v. Tallahassee*¹⁴ involved a negligently operated fire truck which injured the plaintiff. The defense was that the fire department was performing public duties for which the municipality was not liable. The Supreme Court at that time showed a disposition to throw out the entire theory of immunity for cities. However, they did not go quite so far there, but sent the case back to the lower court for further consideration in accordance with the rulings of the Supreme Court. The case eventually was decided in favor of the plaintiff in the lower court and affirmed on appeal.¹⁵ To overcome the immunity theory, the court theorized that the duty of running a fire department was permissive rather than mandatory, that the city was required by law to abate nuisances and by negligently operating fire trucks it created a nuisance which it failed to abate. It would have been far more simple and less circuitous to follow classification III *supra*.

A second fire truck case was decided at the same time as the *Kaufman* case, namely, *Maxwell v. Miami*,¹⁶ it held the city liable for failure to abate a nuisance also, and would more easily fall in classification III *supra*. The *Maxwell* case is important for another reason, which reinforces the theory set out in the *Fortune* and *Pragg* cases. There the court said as a general principle of law:

... The public activities of municipalities are by law required to be performed so as to do no injuries to private rights, that is not immediately essential to conserve the public peace, health, safety, morals, and general welfare. This is the limit of police power.

Any exertion of municipal authority or of the police power is subject to the provisions of organic law that are designed to conserve private rights. In the exercise of police power, property and individual rights may be interfered with, or impaired, or injured,

13. 62 Fla. 275, 55 So. 983 (1914).

14. *Kaufman v. Tallahassee*, 84 Fla. 634, 94 So. 697 (1922).

15. *Kaufman v. Tallahassee*, 87 Fla. 119, 100 So. 150 (1924). Followed in *Bradley v. Jacksonville*, 156 Fla. 493, 23 So.2d 626 (1945); *Miami v. Oates*, 152 Fla. 21, 10 So.2d 721 (1942); *Miami v. McCorkle*, 145 Fla. 109, 199 So. 575 (1941); *Smoak v. Tampa*, 123 Fla. 716, 167 So. 528 (1936); *Swindal v. Jacksonville*, 119 Fla. 338, 161 So. 383 (1935); *West Palm Beach v. Grimmett*, 102 Fla. 680, 137 So. 385 (1931); *Chardkoff Junk Co. v. Tampa*, 102 Fla. 501, 135 So. 457 (1931).

16. 87 Fla. 107, 100 So. 147 (1924). Followed in *Miami v. McCorkle*, 145 Fla. 109, 199 So. 575 (1941); *Swindal v. Jacksonville*, 119 Fla. 338, 161 So. 383 (1935); *Chardkoff Junk Co. v. Tampa*, 102 Fla. 501, 135 So. 457 (1931); *West Palm Beach v. Grimmett*, 102 Fla. 680, 137 So. 385 (1931); *Tarpon Springs Lumber & Supply Co. v. Tarpon Springs*, 100 Fla. 314, 129 So. 609 (1930).

only in the manner and to the extent that is reasonably necessary to conserve the public good. An unreasonable or unnecessary exertion of municipal authority or of the police power in the manner or to the extent in which private, personal, or property rights are curtailed, or impaired, violates organic law in that it deprives persons of liberty and property without authority or due process of law. Municipalities are given police powers to conserve, not to impair, private rights. The organic law contains limitations upon police and municipal powers that may be sought to be conferred by Statute.

In view of the organic rights to acquire, possess, and protect property, and to due process and equal protection of the laws, the principles of non-liability and *damnum absque injuria* are not applicable where in the exercise of municipal authority or of the police power, private, personal, or property rights are interfered with, injured, or impaired in a manner or to an extent that is not reasonably necessary to conserve a public purpose for the general welfare.¹⁷

It is clear that municipal immunity for torts committed by its employees while acting in a public capacity, is only a qualified immunity. If the exercise of the authority is in a manner or to an extent where private, personal or property rights are interfered with, injured or impaired, to an extent that is not reasonably necessary to conserve the public purpose for the general welfare, then it shall be considered actionable, and no immunity in that situation shall exist for such violation of organic rights.

Next, historically, is the case of *Brown v. Eustis*,¹⁸ which is most frequently quoted by municipal attorneys in setting up the doctrine of immunity. The basic facts in that case did not materially differ from the *Scott* case. In the *Eustis* case a police officer without warrant or request entered a store building, arrested the plaintiff who was a guest there and maliciously assaulted him. On appeal the lower court was affirmed and the city held blameless on the grounds that the officer had no authority without a warrant or other authority to enter the building. Therefore, all the injuries which the plaintiff received were the result of the officer doing an act *ultra vires ab initio*. The case may be placed under classification II *supra*, since it merely holds that the city cannot be held liable for acts committed pursuant to an unlawful or prohibited act.

There was a slight variation of the judicial opinion in *Wolf v. Miami*.¹⁹ There a plaintiff was injured by the negligence of a convict driving an automobile belonging to a prison foreman who directed the use of the

17. *Maxwell v. Miami*, 87 Fla. 107, 100 So. 147, 149 (1924).

18. 92 Fla. 931, 110 So. 873 (1926). Followed in *Blankenbeck v. Homestead*, 44 So.2d 817 (Fla. 1950); *Brownlee v. Orlando*, 157 Fla. 524, 26 So.2d 504 (1946); *Bradley v. Jacksonville*, 156 Fla. 493, 23 So.2d 626 (1945); *Phair v. Miami*, 155 Fla. 677, 21 So.2d 208 (1945); *Kennedy v. Daytona Beach*, 132 Fla. 675, 182 So. 228 (1938); *Gerschwiller v. Winterhaven*, 95 Fla. 427, 115 So. 846 (1928).

19. 103 Fla. 774, 134 So. 539 (1931). Followed in *Tampa v. Easton*, 145 Fla. 188, 198 So. 753 (1940).

car to obtain food for the convicts engaged in work under the supervision and control of municipal authority. Without reference to the doctrine of municipal immunity, the city was held liable on the dangerous instrumentality doctrine established in *Herr v. Butler*.²⁰ This was the first time the dangerous instrumentality doctrine was subjected to municipal cases. The case, however, could just as easily have been decided under the *Pragg* case and would have fallen in classification III *supra*.

In *Ballard v. Tampa*,²¹ the city was held liable for the death of a prisoner due to the negligent or wrongful act of the city in superintending the prisoner's labor which he was performing under his sentence. The case falls in classification III and is important since it expresses the opinion of the court toward the immunity doctrine:

Even in the early days there was a disposition to limit the common law doctrine of governmental immunity which gave rise to the saying 'the King can do no wrong but his ministers may.' This ancient doctrine of immunity has been pruned and pared down in the last century, especially with regard to municipal corporations and no court in this land has probably exceeded this court in participation in that process, at least the doctrine should not be extended in the face of Section 4 of our Constitutional Declaration of Rights referred to by Mr. Justice Ellis in the Kaufman case.²²

*Lewis v. Miami*²³ involved damages for the failure of the city to segregate a prisoner from another inmate who had a contagious disease. A state statute requiring segregation formed the basis of liability however, and the case could have more easily been decided by a more direct means under the *Pragg* decision and would come under classification III.

The case of *Kennedy v. Daytona Beach*²⁴ is a famous and familiar case cited by attorneys claiming immunity for the municipality for torts committed by employees while acting in their public capacity. The question on appeal in this case:

Was the lower court correct in holding that the plaintiff in error's sole remedy for a false imprisonment and/or assault and battery at the hands of the defendant in error's police officer was an action solely against the police officer and not the defendant in error city in spite of the fact that the city was being operated under the commission-manager theory of municipal organization?²⁵

In answering in the affirmative, the court cited the *Eustis* case and again used the word "corporate" in misquoting the famous *Pragg* citation. Since

20. 101 Fla. 1125, 132 So. 815 (1931); Followed in *Tampa v. Easton*, 145 Fla. 188, 198 So. 753 (1940).

21. 124 Fla. 457, 168 So. 654 (1936).

22. *Id.* at 657.

23. 127 Fla. 426, 173 So. 150 (1937).

24. 132 Fla. 675, 182 So. 228 (1938).

25. *Id.* at 229.

the *Kennedy* case followed the *Eustis* case, it would have to fall in classification II, an act ultra vires ab initio.

In *McCain v. Andrews*,²⁶ the city employed an investigator to study fires of an incendiary nature. He arrested and prosecuted the plaintiff. The charge was dismissed and the plaintiff sued the city for malicious prosecution, but the city was held not liable. However, a slight inconsistency crops out in the rulings of the court in the case for it was based on the precedents set out by the *Eustis*, *Pragg*, *Kennedy* and *Ballard* cases *supra*.

If we say that the case was based on the *Pragg* case, we are actually deciding that the city could not be held liable for a lawful act executed in a lawful manner. This is most likely for the court commented in the instant case that since there was no "specification as to the manner in which the plaintiff was injured," there was no action against the city, therefore there must have been an authorized manner and there was no evidence to the contrary. The case then would fall in classification I.

If we say the case falls under the rulings of the *Eustis* and *Kennedy* cases we must by force of stare decisis say the case falls in classification II—that the city could not be liable for an unlawful act ab initio. If this be true, then we would have to say the investigator had no authority to arrest the plaintiff and then the city would not be liable. It is doubtful if these cases are controlling.

If we say the case falls under the rulings of the *Ballard* case, we certainly become confused for there the city was held liable on the theory it was maintaining a nuisance and since the city in the *McCain* case was held not liable certainly the *Ballard* case would not apply.

Though the court, by dictum, in the *McCain* case seems to indicate that a city cannot be held liable for a tort committed in the exercise of police powers, this statement is too all inclusive and is contrary to the *Fortune* and *Pragg* cases. The court seemed to be giving the city the status of a county, or quasi corporation, on the facts involved which is also contrary to the *Keggin* case.

The case of *Palm Beach v. Vlahos*²⁷ involved an appeal from a judgment for the plaintiff who was struck by a city car driven by a fire chief. Certain pleas of the plaintiff in error were stricken on demurrer. These pleas were addressed to the third count of the declaration and alleged that at the time and place of the accident the fire chief was not using the car on city business. On appeal, the decision of the lower court striking these pleas was reversed on the ground that the pleas presented issues which, if proven, would result in a verdict for the plaintiff in

26. 139 Fla. 391, 190 So. 616 (1939).

27. 153 Fla. 781, 15 So.2d 839 (1943).

error since the city could not be held liable for an ultra vires act. This case would fall in classification II if it were proven on retrial that the acts of the fire chief were ultra vires, or if not so proven, then classification III would obtain and the city would be liable.

In *Bradley v. Jacksonville*,²⁸ there was a per curiam decision based on the *Eustis* and *Kennedy* cases. In a concurring opinion, Justice Brown said:

The doctrine of municipal immunity for torts committed by its employees engaged in governmental functions comes down to us as part of the common law, which was adopted by the Legislature. If that common law is to be repealed, it would appear to be a legislative function. (38 Am. Jur. 265, 272, 317.)²⁹

The above citation, is one which relates to the *Russell v. Men of Devon* case heretofore mentioned. The ruling in the *Russell* case concerned counties or quasi corporations which were without a common fund to pay damages. It inferred that if it did have a common fund it could be held liable and this was affirmed in the *Fortune* case. Therefore the citation does not apply to municipal corporations under the common law, it having been shown previously in this article that this doctrine did not exist at the time of the adoption by the Supreme Court of Florida of the common law of England. Further, legislation would only be necessary if the duties placed on the municipalities were mandatory and the city was without a common fund as heretofore pointed out.

In *Avon Park v. Giddens*³⁰ the plaintiff was injured by a police car driven by an officer assisting the police chief in bringing in a prisoner. The city was held liable. As a result, the case falls in classification III. The court attempted in the *Avon Park* case to analyze the previous cases on municipal immunity and admitted in its opinion, in effect, that their decisions were somewhat inconsistent. The case is important for the reason that it indicated that the court appears to be in a quandry about the immunity questions and that it has failed, in fact, at times to classify the cases. It seems that as to this so-called classification between corporate and governmental areas, the simplest pattern to follow is the classifications set forth in the *Pragg* case. Confusion occurs when the court seeks to apply that immunity given quasi corporations under the common law, as set out in the *Russell* and *Fortune* cases, to municipal corporations of the present day which did not even exist in their modern conception at the time of the common law, and which under the *Fortune* case were termed aggregate corporations.

28. 156 Fla. 493, 23 So.2d 626 (1945).

29. *Ibid.*

30. 158 Fla. 130, 27 So.2d 825 (1946).

*Goodwin v. Tampa*³¹ is a purely per curium decision. However, there was a lengthy dissent written by Justice Chapman. Under the facts of that case, as stated by the dissent, we find the following: An incompetent, a prisoner in the city stockade under a fifteen year sentence, was shot and killed by a guard during an attempted escape. The defense of the city was based on the theory that since the officer was acting in a purely governmental or sovereign capacity, the city was not liable. The court's affirmance was based on the following Florida decisions: the *Eustis*, *Gerschwiller*, *Kennedy*, *Bradley*, and *Brownlee* cases, as well as decisions from other jurisdictions. Justice Chapman based his dissent on Florida Statutes Section 784.05 which provides a criminal penalty for the negligent or careless injury to others. He concluded that police officers were not excepted from that provision. His opinion also claimed the cases relied on by the majority were not on point, whereas the *Lewis*, *Kaufman*, *Maxwell* and *Ballard* cases were more applicable.

In analyzing the cases cited by the majority of the court we find that the *Bradley*, *Gerschwiller*, *Brownlee* and *Kennedy* cases were based on the *Eustis* holding. Therefore, the only rule of stare decisis which need be considered in determining the correctness of the decision is the law of the *Eustis* case.

The *Eustis* case should not apply, however, for under those facts the officers acted unlawfully and without cover of authority. The city's defense in the instant case, as stated, was that the officer was acting with lawful authority and with cover of office. Since the *Eustis* rule could not have been applied here, and since the court by its own statement in the *Ballard* case asserts, and rightfully so, that probably no court in the nation has exceeded this court in its participation in the process of pruning and paring down the ancient doctrine of immunity with regard to municipal corporations, it would seem that greater weight should have been given to the *Eustis* decision. Thus, since the city's defense was based on the defense of immunity while acting lawfully in the scope of authority, the decision of this court was not based on the proper case.

In analyzing the cases of Justice Chapman we find they embrace the following questions: (1) Was more force used than was necessary to violate organic law? (2) Did the act violate Section 4 of the Declaration of Rights? and (3) Did the act violate Florida Statutes Section 784.05? If any, all or a combination of the above questions could be answered affirmatively by the jury, then under the historical development of the law on this question, Justice Chapman was right and the case would have fallen under classification III.

31. 48 So.2d 164 (Fla. 1950).

The last and most current cases involving the immunity doctrine are those of *Miami v. Bethel*³² and *Williams v. Green Cove Springs*.³³ These cases are important because they indicate a disposition on the part of three members of the Supreme Court of Florida to deny immunity to a municipality in cases falling in classification III. These may be key decisions in Florida opening the wedge in the doctrine of immunity.

In the *Bethel* case, police officers descended on a dice game and the participants ran into a poolroom. One of the officers went into the poolroom and accused the plaintiff of participating in the game. However, under the facts found by the Supreme Court, the plaintiff had left the dice game before the officers arrived. The officer accusing the plaintiff laid hands upon him, brought him outside the poolroom and held him while another officer beat the plaintiff and injured him. The question on appeal was whether the city was liable for the beating. The court found the city was not liable on the basis of the *Kennedy* case, which in turn was based on the *Eustis* case. Therefore, the court had to find under stare decisis that the officers had no authority to enter the poolroom and lay hands on the plaintiff, since the officer had not seen the plaintiff in the dice game, thus making all injuries received by the plaintiff resulting from the acts of the officers an act illegal ab initio.

The dicta of the affirming judges in the above case seems to indicate that cities can never be held liable while their employees are exercising public duties. However, this is contrary to the Florida Constitution Declaration of Rights Section 4 which provides:

All courts in this state shall be open, so that every person for any injury done him in his lands, goods, person, or reputation shall have remedy, by due course of law, and right and justice shall be administered without sale, denial, or delay.

The dicta announced by the Supreme Court is also contrary to the general provisions of law heretofore set out in the citation from the *Maxwell* case, to the effect that the principles of *damnum absque injuria* do not apply where organic rights are violated by the exercise of police powers in an unreasonable manner. Furthermore in the *Pragg* case there was a clear exercise of police powers which were exercised in a reasonable manner; therefore, there was no liability on the part of the city. However, had the manner been unreasonable the city would have been liable under the rules adopted in that case.

In the *Williams* case recovery was denied a wife for the death of her husband, a prisoner, who died in a fire of undetermined origin which

32. 65 So.2d 34 (Fla. 1953).

33. 65 So.2d 56 (Fla. 1953).

consumed the city jail. Under the classifications herein set out, the city would not be liable for there was no showing as to the manner in which the fire was negligently started by the employees of the city and in the absence of such a showing there was no liability and the case would fall in classification I. However, the Supreme Court stated that its decision of non-liability of the city was based on *Elrod v. Daytona Beach*³⁴ and *Lewis v. Miami*.³⁵ This presents an incongruous situation.

In the *Elrod* case the city was held not liable for passage and enforcement of an unconstitutional ordinance. Since the city was without power to enact such an ordinance, it was not liable for acts thereunder. Though the dicta in that case seems to say the basis for non-liability was the fact that the city was enforcing a police regulation and therefore could not be held liable, the legal basis was that the passage of the ordinance was *ultra vires*. Any other reasoning would be contrary to the *Pragg* and *Fortune* cases and the principles of organic law set out in the *Maxwell* decision. If the court in the *Williams* case based its ruling on the dicta of the *Elrod* case the ruling is erroneous. The case might more properly have been decided on the law in the case of *Avey v. West Palm Beach*,³⁶ which involved an automobile accident between the plaintiff and a third party because a stop-and-go signal light of the city was out of order. The city was held not liable on the ground that there was no evidence produced to show that the city had any knowledge of the disorder of the traffic light and in the absence of such evidence, the case falls in classification I.

In the *Lewis* case, the city was held liable for failing to segregate a prisoner from one who had a venereal disease. If the *Williams* case was based on the law in the *Lewis* case, the city would be liable on the grounds of a lawful act of imprisonment and an unauthorized manner of care of the prisoner. Since the city was held not liable, it is doubtful that the *Lewis* case was controlling.

The dissent of Justice Terrell in the *Williams*³⁷ case is in favor of holding municipalities liable for lawful acts performed in an unauthorized manner and this thought is concurred in by Justice Hobson and Chief Justice Roberts.

CONCLUSION

Substantive law requires that a city be held liable for a lawful act performed in an unauthorized manner. The law now permits recovery

34. 132 Fla. 24, 180 So. 378 (1938).

35. 127 Fla. 426, 173 So. 150 (1937).

36. 152 Fla. 717, 12 So.2d 881 (1943).

37. 65 So.2d 56, 58 (Fla. 1953).

in such cases against the city and ultimately its taxpayers and citizens—not as individuals—but as beneficiaries of a common fund. These same citizens and taxpayers who pay the city employees for their public functions have a right to be critical of their acts and if they act in a manner which tends to violate organic rights, these same citizens and taxpayers should have action. If we deny the action, municipal employees under their public powers may, act in effect, with impunity. Many judgments against the municipality in such instances would result in a strict supervision over the manner of exercise of public duties by its employees. The trend toward support of this theory is established by the lengthy dissents in the *Bethel* and *Williams* cases.

APPENDIX

LIABILITY OF MUNICIPAL CORPORATIONS IN TORT CASES³⁸

A. Theory of Liability

a. *Tallahassee v. Fortune*, 3 Fla. 19 (1849)

1. A city is an aggregate corporation with a common fund.
2. A county is a quasi corporation without a common fund.

b. A quasi corporation under the common law was not liable for tort because:

1. They are invested with powers without consent of inhabitants;
2. They have no corporate fund;
3. They have no legal means of obtaining a corporate fund;
4. Without a fund each corporator would be liable.

aa. This burden the common laws would not impose without statute.

bb. But in regular corporations which have or may be supposed to have a corporate fund, this reasoning does not apply.

i. Tallahassee is an aggregate corporation which has, or may be supposed to have a common fund, because:

aaa. It has the power of assessing and collecting taxes.

bbb. It has the power to purchase and hold real, personal and mixed property.

cc. As a result, Tallahassee and cities may be held liable in tort.

38. Cases in which a county rather than a municipality was involved: *Keggin v. Hillsborough County*, 71 Fla. 356, 71 So. 372 (1916); *Russell v. Men of Devon*, 2 T.R. 667, 12 Eng. Rul. Cas. 694 (1788).

B. Determination of Liability**a. Orlando v. Pragg, 31 Fla. 111, 12 So. 368 (1893).**

1. A municipal corporation is not liable for tortious acts committed by its officers and agents, unless the acts complained of were committed in the exercise of some power conferred upon it by law, or in the performance of some duty imposed upon it by law.
2. Such a corporation is liable for a lawful and unauthorized act of its agents done in an unauthorized manner, but not for an unlawful or prohibited act.
3. It is possible for all the cases on point in Florida to be placed in one of three categories:

I. Not liable for authorized act executed in lawful and authorized manner:

Williams v. Green Cove Springs, 65 So.2d 56 (Fla. 1953).

Avery v. West Palm Beach, 152 Fla. 717, 12 So.2d 881 (1943).

McCain v. Andrews, 139 Fla. 391, 190 So. 616 (1939).

Orlando v. Pragg, 31 Fla. 111, 12 So. 368 (1893).

II. Not liable for unlawful or prohibited act:

Miami v. Bethel, 65 So.2d 34 (Fla. 1953).

Blankenbeck v. Homestead, 44 So.2d 817 (Fla. 1950).

Brownlee v. Orlando, 157 Fla. 524, 26 So.2d 504 (1946).

Bradley v. Jacksonville, 156 Fla. 493, 23 So.2d 626 (1945).

Swanson v. Fort Lauderdale, 155 Fla. 720, 21 So.2d 217 (1945).

Phair v. Miami, 155 Fla. 677, 21 So.2d 208 (1945).

Palm Beach v. Vlahos, 184 Fla. 159, 15 So.2d 839 (1943).

McCain v. Andrews, 139 Fla. 391, 190 So. 616 (1939).

Kennedy v. Daytona Beach, 132 Fla. 675, 182 So. 228 (1938).

Elrod v. Daytona Beach, 132 Fla. 24, 180 So. 378 (1938).

Gerschwiller v. Winter Haven, 95 Fla. 427, 115 So. 846 (1928).

Brown v. Eustis, 92 Fla. 931, 110 So. 873 (1926).

Scott v. Tampa, 62 Fla. 275, 55 So. 983 (1914).

III. Liable for lawful and authorized act performed in unauthorized manner:

Goodwin v. Tampa, 48 So.2d 164 (1950).

Avon Park v. Giddens, 158 Fla. 130, 27 So.2d 825 (1946).

Palm Beach v. Vlahos, 184 Fla. 159, 15 So.2d 839 (1943).

Miami v. Oathes, 152 Fla. 21, 10 So.2d 721 (1942).

Barth v. Miami 146 Fla. 542, 1 So.2d 574, 578-579 (1941).

Miami v. McCorkle, 145 Fla. 109, 199 So. 575 (1941).

Tampa v. Easton, 145 Fla. 188, 198 So. 753 (1940).

- Lewis v. Miami, 127 Fla. 426, 173 So. 150 (1937).
Ballard v. Tampa, 124 Fla. 457, 168 So. 654 (1936).
Smoak v. Tampa, 123 Fla. 716, 167 So. 528 (1936).
Swindall v. Jacksonville, 119 Fla. 338, 161 So. 383 (1935).
West Palm Beach v. Grimmett, 102 Fla. 680, 137 So. 385 (1931).
Chardkoff Junk Co. v. Tampa, 102 Fla. 501, 135 So. 457 (1931).
Wolfe v. Miami, 103 Fla. 774, 134 So. 539 (1931).
Tarpon Sprngs Lumber & Supply Co. v. Tarpon Springs, 100 Fla. 314, 129 So. 609 (1930).
Kaufman v. Tallahassee, 87 Fla. 119, 100 So. 150 (1924).
Maxwell v. Miami, 87 Fla. 107, 100 So. 147 (1924).
Kaufman v. Tallahassee, 84 Fla. 634, 94 So. 697 (1922).
Tallahassee v. Fortune, 3 Fla. 19 (1849).